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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970.

No. 208.

UNIVERSAL BUILDERS, INC., ET AL.,
Petitioners,

vs.

SIDNEY AND JULIA CLARK, ET AL.,
Respondents.

PETITIONERS' REPLY BRIEF.

ARGUMENT.

I. The Decision Below Is Unsupportable and Conflicts With Repeated Decisions of This Court and the Illinois Courts That a Cause of Action Accrues When the Plaintiff May First Maintain His Suit.

Respondents first argue (Brief in Opposition at 4) that, under applicable federal law, limitations "does not commence to run until the termination of the contracts." Significantly, they cite no decision which so holds. There simply is none. They next seek to justify the erroneous ruling below by arguing (Brief in Opposition at 4, 6) that "the rationale and holding" of a footnote in *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U. S. 481,

n. 15 at 502 (1968), support the Seventh Circuit's decision. They contend (Brief in Opposition at 4) that petitioners' receipt of the monthly payments payable under the contracts constituted a continuing civil rights violation just as the continuing Sherman Act violation found by this Court in *Hanover Shoe* was "continuing exploitation" of "unlawful original contracts". They further contend (Brief in Opposition at 6) that the Seventh Circuit correctly reached a result tolling the statute of limitations because that same footnote in *Hanover Shoe* establishes "rules tolling" limitations where a continuing violation of a federal statute is alleged. Both of these contentions are unsupportable.

The continuing Sherman Act violation to which this Court referred in the footnote on which respondents rely was not the continuous receipt of rent under the leases, but that the defendant United Shoe continuously adhered to its lease-only policy by refusing to sell machines while possessing monopoly power. As both the refusal to sell and the possession of monopoly power continued from day to day, each day's refusal was itself an unlawful exercise of monopoly power. *Hanover Shoe*, 392 U. S. at 483, 500-502. *That* was the continuing Sherman Act violation which this Court held had been committed, and *not* receipt of rent as respondents argue.

Furthermore, neither *Hanover Shoe* nor any other decision holds that limitations is *tolled* from the beginning until the end of a continuing violation.[1] See *Zenith Radio Corp.*

1. Respondents' erroneous "tolling" analysis of *Hanover Shoe* is apparently based upon the belief that the leases in effect in 1955 when Hanover sued were the same leases Hanover had signed in 1912 (see Brief in Opposition at 4). This was not the fact. Hanover's 1912 leases expired in 1922. See *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 245 F. Supp. 258, 264 (M. D. Pa. 1965).

v. *Hazeltine Research, Inc.*, 395 U. S. 100, n. 13 at 117 (1969). Yet that is the result of the decision below.

Lastly, in desperation, respondents attempt to justify the Seventh Circuit's unprecedented holding that the complaint alleges a continuing violation by arguing (Brief in Opposition at 5) that "the contracts here are the legal equivalent of contracts for unlawful servitude," and that one held in servitude may sue to end that condition so long as it exists. The suggestion that an obligee of a contract to pay money is a slave is not only unsupportable but preposterous.

The petition points out (at 12-15) the clear conflict between the Seventh Circuit's decision and an unbroken line of decisions of this Court and the Illinois courts construing the pivotal word "accrued" of the controlling statute of limitations to mean the time when the action may *first* be brought. Respondents' effort to explain away this conflict is patently without merit.

They argue (Brief in Opposition at 6) that state court and diversity decisions are "irrelevant" because the right they here seek to assert is federally created.[2] In making this argument they refuse to recognize that the Illinois Limitations Act is applied to this case by the Rules of Decision Act, 28 U. S. C. § 1652, as one of "[t]he laws of" the State of Illinois. The decisions of the courts of Illinois, including its highest court, construing this Illinois statute (cited in the petition at 12, 14-15), far from being "irrelevant" as respondents contend, are conclusive. *Barsky* v. *Board of Regents*, 347 U. S. 442, 448 (1954); *Aero May-*

2. If respondents are correct in contending that decisions of state law are "irrelevant", then the only decision upon which they rely to support the decision below, *Hanover Shoe*, is itself "irrelevant". The limitations issue there was proper application of a *Pennsylvania* statute of limitations, *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 377 F. 2d 776, 780, 790-791 (3rd Cir. 1967).

flower Transit Co. v. *Board of Railroad Commissioners*, 332 U. S. 495, 499-500 (1947). Moreover, since the pivotal statutory word "accrued" has the same meaning in all jurisdictions, the fact that one of the decisions of this Court relied on by petitioners (at 12) was a diversity case[3] does not distinguish it from the case at bar. Significantly, respondents ignore the non-diversity decisions of this Court also appearing at page 13 of the petition which place the same construction on the word "accrued" where the cause of action did arise under a federal statute.[4]

The petition also demonstrates (at 14-15) that the lower court's holding that the complaint alleges a continuing violation and continuing injury is patently erroneous and conflicts with *Keithley* v. *Mutual Life Ins. Co.*, 271 Ill. 584, 599-600, 111 N. E. 503 (1916); *Steiner* v. *Twentieth Century-Fox Film Corp.*, 232 F. 2d 190 (9th Cir. 1956); *Berry* v. *Chrysler Corp.*, 150 F. 2d 1002 (6th Cir. 1945); *Fleischer* v. *A. A. P., Inc.*, 180 F. Supp. 717, 723 (S. D. N. Y. 1959); *Skouras Theatres Corp.* v. *Radio-Keith-Orpheum Corp.*, 193 F. Supp. 401, 406 (S. D. N. Y. 1961), all of which are factually indistinguishable from the case at bar. In each of these cases, the plaintiff had entered into an injurious contract outside the applicable limitations period; in each, the defendant or a co-conspirator had enforced or accepted contract performance by the plaintiff within the limitations period. Each of those plaintiffs could have sued when he signed his contract, just as each respondent here could have done. Each of those plaintiffs had become legally obligated to perform his contract, for its entire life, when

3. *Wilcox* v. *Plummer*, 4 Pet. 172, 180 (1830).

4. *United States* v. *Lindsay*, 346 U. S. 568, 569 (1954); *Unexcelled Chemical Corp.* v. *United States*, 345 U. S. 59, 65 (1953); *United States ex rel. Louisville Cement Co.* v. *Interstate Commerce Commission*, 246 U. S. 638, 644 (1918); *United States* v. *Atlantic Mutual Ins. Co.*, 298 U. S. 483, 488-490 (1936); *Crown Coat Front Co.* v. *United States*, 386 U. S. 503 (1967).

he signed it, just as did each respondent here. Each of those courts held the plaintiff barred by limitations, just as the Seventh Circuit should have but did not hold here.

Respondents do not even attempt to distinguish *Keithley* and *Steiner*, and they cannot. They argue (Brief in Opposition at 6) that *Berry* and *Skouras* did not involve continuing violations and *Fleischer* did not involve continuing injury. This does not distinguish those cases from the one at bar but merely describes the conflicting holdings rendered on indistinguishable facts.

Petitioners rely upon the express language of the governing statute of limitations and an unbroken line of decisions of this Court and the Illinois courts over the past 100 years and more (see petition at 12). On the other hand, respondents attempt to support the decision below by invoking non-existent "rules tolling" limitations where a continuing violation is alleged, by relying upon an imaginary holding that receipt of rent is a Sherman Act offense, and even by arguing that the obligee of a contract to pay money is a slave. From these facts they conclude *petitioners* would have this Court apply "new rules" (Brief in Opposition at 7). It is suggested that the shoe is on the *other* foot, and this is precisely why review by this Court is required.

II. The Seventh Circuit's Decision Also Conflicts With Applicable Decisions of This Court Because It Fails to Apply the Statute of Limitations in a Way Effectuating Repose and Applies the Doctrine of Continuing Offenses to Impose Liability for Acts Done Outside the Limitations Period.

Respondents argue (Brief in Opposition at 8) that the prohibition against use of the continuing offense doctrine to impose liability for acts done outside the limitations period, most recently applied by this Court in *Toussie* v.

United States, ... U. S. ....., 25 L. ed. 2d 156, 161 (1970), is inapplicable here even though that is precisely what the Seventh Circuit did (see Petition at 15-17). They say *Toussie* was a criminal case, ignoring the other decisions of this Court cited at page 16 of the petition which indicate that the same principles are also applicable to civil actions.[5] They also say that the offense charged in *Toussie* was held not to have been a continuing one, again merely describing a holding while sweeping aside the principles applied in reaching it, principles which cannot be reconciled with the decision below.

Finally, respondents attempt to support the decision below by relying (Brief in Opposition at 7) upon this Court's statement in *Crown Coat Front Co.* v. *United States*, 386 U. S. 503 (1967) that statutes of limitations should be construed in light of the general purposes of the substantive statute invoked. What respondents fail to recognize is that this Court looked to the general purpose of the substantive statute to determine when the claim there presented could *first* have been asserted in court, holding that is when a cause of action "accrues" within the meaning of 28 U. S. C. § 2401(a), the statute of limitations applicable there, 386 U. S. at 507. This is precisely the standard which the Seventh Circuit erroneously failed to apply here. It is not and cannot be disputed that each respondent could first have sued when he signed his contract. Thus, under all the applicable decisions of this and the Illinois courts, the governing statute of limitations bars the claim of each respondent who did not sue within five years of that time. The Seventh Circuit's decision to the contrary cannot be harmonized with the controlling decisions, and review by this Court is required.

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5. *Guaranty Trust Co. of N. Y.* v. *United States*, 304 U. S. 126, 136 (1938); *Campbell* v. *City of Haverhill*, 155 U. S. 610, 617 (1895); *Wood* v. *Carpenter*, 101 U. S. 135, 25 L. ed. 807, 808 (1879).

III. Prejudice to Petitioners Is Uncontrovertible, and Respondents' Claim of Injustice to Themselves Is Baseless.

Respondents cavalierly assert that petitioners "raise no claim of substantial injustice that might be suffered by them" (Brief in Opposition at 3). To the contrary, the statute of limitations represents a conclusive presumption of prejudice to petitioners.[6] *Wood* v. *Carpenter*, 101 U. S. 135, 25 L. ed. 807, 808 (1879); *Horn* v. *City of Chicago*, 403 Ill. 549, 559-560, 87 N. E. 2d 642 (1949), cert. denied, appeal dismissed, 338 U. S. 940.

Respondents further argue (Brief in Opposition at 3, 8) that they would suffer "grave injustices" if any of them are held barred because they claim that they could not have known the validity of the cause of action now asserted until this Court decided *Jones* v. *Mayer*, 392 U. S. 409 (1968). But that decision merely held, the first time the question was presented to this Court, that state action is not an essential element of violation of 42 U. S. C. § 1982. Since the complaint alleges state action, that petitioners:

> ". . . acted under color of the laws of Illinois and of its municipalities, and under color of the custom and usage of residential racial segregation alleged above. They [petitioners] also made use of the laws and customs of the State of Illinois, the County of Cook and the City of Chicago. . . ." (A. 11),

Jones v. *Mayer* could not have affected respondents' confidence in the validity of their claim.[7]

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6. Indeed, some witnesses are already deceased (see petition at 17).

7. Petitioners deny the sufficiency of the allegations of state action, but resolution of that issue, not decided below (A. 42, 75-76) is unnecessary here. There is no possible justification for respondents' delay in making the allegations of state action which they now make.

CONCLUSION.

The petition shows that the Seventh Circuit's decision is unprecedented, disregards the plain language of the controlling statute of limitations, conflicts with all the applicable decisions of this Court, the Illinois courts and other federal courts, and steers a collision course with every principle this Court has ever said should guide the courts in applying statutes of limitations. The petition also shows that this case has significance extending far beyond the personal interests of the particular litigants, for the Seventh Circuit's decision would apply equally to all credit transactions, would be authority for maintenance now of civil rights suits attacking countless thousands of credit transactions entered into decades in the past and, for the future, would virtually repeal a six-month limitations provision enacted by Congress only two years ago.

Petitioners believe it hardly possible to show more urgent need for review by this Court, and they pray that their petition be granted.

Respectfully submitted,

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